

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

TROPICAL NURSING, INC.,                    )  
  )  
  ) Plaintiff,                                    )  
  ) C.A. No. 04C-08-127 MMJ  
  ) v.    )  
  )    )  
ACCORD HEALTH SERVICE, INC.,            )  
  )  
  ) Defendant.                                )

**MEMORANDUM OPINION**  
**FOLLOWING BENCH TRIAL**

Decided: December 7, 2006

Charles S. Knothe, Esquire, Charles S. Knothe, P.A., Wilmington, Delaware,  
Attorney for Plaintiff

David A. Felice, Esquire, Cozen O'Connor, Wilmington, Delaware, Attorney for  
Defendant

Johnston, J.

Plaintiff Tropical Nursing, Inc., (“Tropical”) filed a complaint alleging breaches of contract by defendant Accord Health Service at Brandywine (“Accord”). Tropical is in the business of providing temporary nursing staff. Accord operates a healthcare facility called Brandywine Nursing and Rehabilitation Center (“Brandywine”).

Tropical provided temporary nursing staff to work at the Brandywine facility. Each Tropical employee’s hours are confirmed by a timecard, signed by the Tropical employee and a Brandywine employee. The back of the timecard sets forth “Terms and Conditions,” which include:

WE realize that an ongoing contractual relationship exists between Tropical, and its employees, who are assigned to work with us. WE AGREE NOT TO INTERFERE WITH OR DISRUPT THIS RELATIONSHIP WHILE SAID EMPLOYEES ARE ON AN ASSIGNMENT AND FOR A PERIOD OF 180 DAYS FOLLOWING TERMINATION OF ANY TEMPORARY ASSIGNMENT HEREUNDER.

WE realize that Tropical has expenses in maintaining a temporary staff (advertising, recruiting, interviewing, testing, checking of licenses, health and references) and that if WE transfer one of their employees to our payroll or to our Per diem register/PRN pool or to the payroll of one of our subsidiaries, other related companies, related group working or otherwise associated with our premises, a work release payment is immediately due and payable upon demand. The standard work release payment will be 25% of the employee’s yearly rate, as billed to the client, on a 40 hour week.<sup>1</sup> This is required until

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<sup>1</sup>Other timecards set forth the following language: “The standard work release payment will be five hundred (500) times the hourly billing rate for that employee.” Because of the Court’s resolution of the liquidated damages issue, this difference is irrelevant.

the employee completes 1,000 hours in continuous assignment(s) to the client, (specific facility named on reverse side above client name).

WE further agree not to accept this employee for assignment from any other temporary agency for a period of 180 days following the end of this assignment.

Tropical claims that Brandywine breached its contractual obligations with regard to 14 Tropical employees. Tropical alleges that Brandywine directly hired Tropical employees before the employees worked 1,000 hours in continuous assignment, or before the expiration of 180 days from the termination of the Tropical temporary assignment. Therefore, Tropical asserts that it is entitled to liquidated damages measured as 25% of each Tropical employee's yearly rate.

Brandywine contends that the timecard does not constitute a contract because timecards were not signed by persons having authority to bind Brandywine.<sup>2</sup> Additionally, Brandywine asserts that the liquidated damages clause is not enforceable because it constitutes a penalty. Brandywine also claims that the liquidated damages clause is not applicable because Brandywine used the services of Tropical employees through other agencies and did not directly hire the employees. Finally, Brandywine argues that the applicable statute of limitations applies to bar Tropical's claims concerning 3 of the 14 employees.

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<sup>2</sup>It is not disputed that an appropriate Brandywine representative has the authority to bind Brandywine to a contract for temporary nursing services at Brandywine's facility.

## **FINDINGS OF FACT**

During the non-jury trial, the parties presented live testimony and documentary evidence. Tropical's president and sole shareholder testified concerning the expenses involved in recruiting and retaining nursing employees, and in marketing nursing services with healthcare providers. Tropical's president stated that he discussed the timecard and billing system, including the liquidated damages provisions, with the administrator of Brandywine. Brandywine's representative did not object to any of the terms and conditions.

Brandywine's assistant administrator testified that Brandywine's administrator made the decisions about which nursing agencies to use. Brandywine's administrator holds a management position.

Brandywine's procedure was that Tropical employee timecards were signed by the Brandywine nurse supervising the Tropical employee. The supervising nurse may have been a Brandywine employee or may have been a temporary employee from another agency. The signature verified that the Tropical nurse worked the hours indicated. Regardless of who signed the timecard, Brandywine paid Tropical based upon the information contained on the timecard. It was undisputed that Tropical's invoices would not have been paid by Brandywine in the absence of signed timecards.

The relevant time period for each Tropical employee is limited to 180 days following the end of Tropical’s assignment to the Brandywine facility. For some employees, some timecards were missing. However, because it is undisputed that Tropical would not have been paid without a signed timecard, the Court finds that the absence of a timecard at trial is not dispositive. As to each of the 14 Tropical employees, the evidence demonstrates the following:

<b>Employee</b>	<b>Tropical Employee at Brandywine</b>	<b>Brandywine Direct Hire</b>	<b>Brandywine Other Agency</b>	<b>Tropical Hourly Rate</b>
Brocks	5 days	0	2 days	\$42.95
Brown	16 days	\$24,225.00 (Actual)	0	\$47.95
Cannon	24 days	0	1 day	\$44.95
Davis	3 days	0	2 days	\$47.95
Fuller	2 days	0	1 day	\$20.50
Kennedy	1 day	0	2 days	\$44.95
Kroma	1 day	0	1 day	\$47.95
McDowell	2 days	0	4 days	\$47.95
Oyaide	2 days	0	1 day	\$49.95
Swanson	1 day	0	1 day	\$45.95
Williamson	7 days	0	2 days	\$45.95
Wilson	7 days	0	2 days	\$41.95

Regardless of whether the timecards constitute a valid contractual obligation, Tropical is not entitled to any damages for the following employees:

Aranga - not employed by Brandywine following Tropical placement;

Williams - did not work any shift at Brandywine through Tropical placement.

### **ANALYSIS**

#### ***TIMECARDS AS CONTRACTS***

The evidence at trial demonstrated that the Brandywine administrator approved the arrangement whereby Tropical provided temporary nursing services to Brandywine in exchange for *per diem* compensation. It was not disputed that the administrator was authorized to bind Brandywine to contractual obligations. The Brandywine administrator met with Tropical's president and discussed the parties' employment arrangement. The evidence presented shows that Brandywine's representative was aware of the timecard procedure, including the terms and conditions printed on the back of the timecards. Brandywine claims that the signing supervising nurses, particularly those who were not direct Brandywine employees, did not have actual authority to bind Brandywine.

The issue is whether the signing nurse supervisors had either actual or apparent authority to enter into a contractual agreement on behalf of Brandywine.

Actual authority is authority that is expressly or implicitly granted by a principal to an agent.<sup>3</sup> Apparent authority is not actually granted. Instead, the principal knowingly or negligently permits an agent to exercise authority, or permits the agent to hold himself or herself out as possessing authority.<sup>4</sup>

In this case, it is clear that the signed timecards were a prerequisite for approval of payment by Brandywine to Tropical. The timecards could be verified only by a Brandywine representative, *i.e.*, a nursing supervisor. For this purpose, it is irrelevant whether the supervisor was a direct Brandywine employee, or an agency employee. Brandywine delegated to the shift supervisor the responsibility to verify Tropical employee timecards. While the supervisors obviously did not have unlimited authority to bind Brandywine contractually, the Court finds that the supervisors had both actual and apparent authority to bind Brandywine to the terms and conditions of the Tropical timecards.

### ***STATUTE OF LIMITATIONS***

Brandywine argues that Delaware's three-year contract statute of limitations<sup>5</sup> applies in this case to bar three of Tropical's claims. A breach of

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<sup>3</sup>*Billops v. Magness Constr. Co.*, 391 A.2d 196, 197 (Del. 1989).

<sup>4</sup>*Henderson v. Chantry*, 2002 Del. Ch. LEXIS 14, at \*14.

<sup>5</sup>10 *Del. C.* §8106.

contract claim ordinarily accrues on the date of the breach.<sup>6</sup> However, the time of discovery rule applies in exceptional circumstances in which discovery of the existence of the cause of action at the time of injury was a practical impossibility.<sup>7</sup> In order to toll the statute of limitations, the injury or conditions giving rise to the claim must have been inherently unknowable and the plaintiff blamelessly ignorant.<sup>8</sup> It is not the actual discovery of the cause of action, but the discovery of facts sufficient to put a person of ordinary intelligence on inquiry which, if pursued, would lead to discovery.<sup>9</sup>

Tropical filed the complaint on August 13, 2004. Any claim arising before August 13, 2001 is barred, unless the time of discovery exception applies. The breaches occurred on the day each Tropical employee began to work at the Brandywine facility, before the expiration of 180 days after the end of the Tropical assignment. Tropical employee Brocks' Brandywine assignment began January 1, 2001. Employee Fuller's Brandywine assignment began January 6, 2001. Employee Wilson's Brandywine assignment began December 25, 2000.

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<sup>6</sup>*Certainfeed Corp. v. Celotex Corp.*, 2005 WL 217032, at \*5 (Del. Ch.).

<sup>7</sup>*Ruger v. Funk*, 1996 WL 110072, at \*2 (Del. Super.).

<sup>8</sup>*Layton v. Allen*, 146 A.2d 794, 798 (Del. 1968).

<sup>9</sup>*Becker v. Hamada, Inc.*, 455 A.2d 343, 356 (Del. 1982).

By letter postmarked December 13, 2002, Brandywine sent a “Service Letter” to Tropical regarding Tropical employee Brown. The form Service Letter sought information from Tropical, as a former employer, concerning Brown’s then-current employment with Brandywine, for the purpose of compliance with healthcare licensure. Tropical claims that this Service Letter was its first notice that Brandywine was hiring Tropical employees.

The evidence is consistent with Tropical’s claim. Brandywine did not notify Tropical prior to the December 13, 2002 letter that it was employing, or accepting assignments of, Tropical employees. Witnesses testified that former and then-current Tropical employees were hesitant to disclose their work in the Brandywine facility. Tropical met its burden of demonstrating that it had no knowledge of Brandywine’s breaches prior to the December 2002 letter. Further, in consideration of the evidence of affirmative concealment of subsequent Brandywine employment from Tropical, the Court finds that conditions giving rise to Tropical’s claims regarding Brocks, Fuller and Wilson were inherently unknowable and Tropical was blamelessly ignorant.

Therefore, the time of discovery exception applies and no claims in this action are barred by the statute of limitations.

## ***LIQUIDATED DAMAGES CLAUSE***

The liquidated damages provision at issue provides that Brandywine shall not “interfere with or disrupt” the contractual relationship between Tropical and its employees who are assigned to Brandywine, for a period of 180 days following the termination of any temporary assignment of a Tropical employee to Brandywine’s facility. In the event of breach of the timecard “Terms and Conditions,” Brandywine would be required to make a “work release payment” in the amount of “25% of the employee’s yearly rate, as billed to the client, on a 40 hour week.” The timecard further provides that Brandywine agrees not to accept any Tropical employee for assignment from any other temporary agency for a period of 180 days following the end of an assignment.<sup>10</sup>

Liquidated damages provisions are presumptively valid, unless enforcement would serve as a penalty, rather than as a reasonable assessment of anticipated damages.<sup>11</sup> To be enforceable, the liquidated damages provision must measure:

(1) the damages which the parties might reasonably anticipate are difficult to ascertain (at the time of contracting) because of their

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<sup>10</sup>Brandywine has argued that the liquidated damages provision does not apply to assignment of a Tropical employee by another temporary agency during the 180 day period. Because of the Court’s ruling on the validity of the liquidated damages measurement, the Court need not resolve this issue.

<sup>11</sup>*S.H. Deliveries, Inc. v. TriState Courier & Carriage, Inc.*, 1997 WL 817883, at \*2 (Del. Super.).

indefiniteness or uncertainty, and (2) the amount stipulated is either a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to the damages which have actually been caused by the breach.<sup>12</sup>

In considering a substantively identical liquidated damages clause, this Court previously held that the liquidated damages provision, contained in the “Terms and Conditions” printed on the back of the timecard, was invalid. The Court found that the potential damages were not difficult to ascertain at the time of contracting because they were not indefinite or uncertain. Further, the liquidated damages provision was a penalty and not a reasonable estimate of the damages which probably would be caused by a breach.<sup>13</sup>

In this case, the Court finds that the liquidated damages provision on the back of the timecards is invalid. Therefore, Tropical is entitled to actual damages for breach of contract.

### ***MEASURE OF DAMAGES***

Based on the evidence presented at trial, the Court finds that the appropriate measure of actual damages is 25% of the relevant Tropical employees’ hourly rate, for those hours actually worked by the employees, in Brandywine’s facility,

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<sup>12</sup>*Id.*

<sup>13</sup>*Tropical Nursing, Inc. v. Arbors at New Castle Subacute and Rehabilitation Center*, Del. Super., C.A. No. 03C-09-204, Cooch, R.J. (Apr. 4, 2005).

before the expiration of 180 days following the end of the Tropical assignment.

This calculation is Tropical's estimate of its hourly lost net profit. This measure applies regardless of whether the Tropical employee was a Brandywine direct hire or employed by assignment from another temporary nursing agency. In both circumstances, the subsequent employment was in breach of the contractual language on the timecards.

Following is the Court's damages calculation:

Brocks	16 hours x 42.95 = 687.20	25% = 171.80
Brown	\$24,225.00	25% = 6,056.25
Cannon	8 hours x 44.95 = 359.60	25% = 89.90
Davis	16 hours x 47.95 = 767.20	25% = 191.80
Fuller	8 hours x \$20.50 = 164.00	25% = 41.00
Kennedy	16 hours x \$44.95 = 719.20	25% = 179.80
Kroma	8 hours x \$47.95 = 383.60	25% = 95.90
McDowell	32 hours x \$47.95 = 1,534.40	25% = 383.60
Oyaide	8 hours x \$49.95 = 399.60	25% = 99.90
Swanson	8 hours x \$45.95 = 367.60	25% = 91.90
Williamson	16 hours x \$45.95 = 735.20	25% = 183.80
Wilson	16 hours x \$41.95 = 671.20	<u>25% = 167.80</u>
<b>TOTAL</b>		<b>\$7,753.45</b>

## CONCLUSION

The Court finds that the time of discovery rule applies, and no claims in this action are barred by the statute of limitations. The Court further has determined that the timecards constitute valid contracts for the provision by Plaintiff of temporary nursing services to Defendant. Defendant's nursing supervisors had both actual and apparent authority to bind Brandywine to the terms and conditions set forth on the Tropical Nursing, Inc. timecards. However, the liquidated damages provision on the back of the timecards is invalid. Therefore, Tropical is entitled to actual damages for breach of contract in the amount of \$7,753.45.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston